



NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

BEN B. SAFYARI,

Debtor.

Case No. 2:18-bk-18712-RK

Chapter 11

**MEMORANDUM DECISION ON MOTION
OF CREDITOR JOE KLEIN TO DISMISS
BANKRUPTCY CASE**

Trial

Date: June 13, 2019

Time: 10:00 a.m.

Place: Courtroom 1675
Roybal Federal Courthouse
255 East Temple Street
Los Angeles, CA 90012

On June 13, 2019, the court conducted a trial on the contested matter of the motion of Creditor Joe Klein ("Klein") to dismiss this Chapter 11 bankruptcy case of Debtor Ben B. Safyari ("Debtor"), Docket Number 143, filed on April 5, 2019 (the "Motion to Dismiss"). Niv V. Davidovich and Ed Sherman of the law firm of Davidovich Kaufman Legal Group, APA, appeared for Klein, the moving party. Raymond H. Aver and Kateryna Bilenka of the Law Offices of Raymond H. Aver appeared for Debtor, the responding party. Having considered the testimony of the witnesses and the exhibits and other evidence received at

1 trial, the other papers and pleadings in this case, the court hereby issues its findings of fact
2 and conclusions of law in this contested matter pursuant to Federal Rules of Bankruptcy
3 Procedure 7052 and 9014 and Federal Rule of Civil Procedure 52. In this regard, the court
4 notes that in addition to the trial declarations submitted before trial, the court heard live
5 testimony of multiple witnesses, including Debtor. The court had the opportunity to
6 observe the demeanor of the witnesses and to assess their credibility. This memorandum
7 decision adopts the court's tentative ruling orally stated at trial to dismiss the case and
8 expands upon the reasoning articulated at trial.

9 At the conclusion of trial, the court granted Debtor's request for leave to file
10 supplemental briefing to address the issue of whether bad faith filing of a bankruptcy
11 petition constitutes "cause" for dismissal pursuant to 11 U.S.C. § 1112. Debtor filed his
12 supplemental brief on June 21, 2019, Klein filed his reply thereto on June 28, 2019, and
13 the court has considered both supplemental briefs of the parties.

14 The Ninth Circuit has held that a lack of good faith in filing a Chapter 11 bankruptcy
15 petition establishes "cause" for dismissal under 11 U.S.C. § 1112(b). *In re Marsch*, 36 F.3d
16 825, 828 (9th Cir. 1994). "The existence of good faith depends on an amalgam of factors
17 and not upon a specific fact." *Id.* (quoting *Idaho Department of Lands v. Arnold (In re*
18 *Arnold)*, 806 F.2d 937, 939 (9th Cir. 1986)). "A bankruptcy case is filed in bad faith if it was
19 brought for 'tactical reasons unrelated to reorganization.'" *In re Moore*, 583 B.R. 507, 512
20 (C.D. Cal. 2018), *aff'd sub nom.*, *Moore v. U.S. Trustee for Region 16*, 749 Fed. Appx. 621
21 (9th Cir. 2019) (quoting *In re Marsch*, 36 F.3d at 828); *see also In re Greenberg*, No. SC-
22 16-1350, BJUK, 2017 WL 3816042 at *4 (9th Cir. BAP 2017), *appeal dismissed*, No. 17-
23 60078, 2018 WL 1989502 (9th Cir., order for dismissal entered on February 14, 2018)
24 (relying on *In re Marsch* and affirming dismissal under 11 U.S.C. § 1112(b)(1) for bad
25 faith). "On a motion to dismiss under [11 U.S.C.] § 1112(b), the debtor bears the burden to
26 prove the chapter 11 petition was filed in good faith." *In re Greenberg*, No. SC-16-1350
27 BJUK, 2017 WL 3816042, at *4 (citing *Marshall v. Marshall (In re Marshall)*, 721 F.3d 1032,
28 1048 (9th Cir. 2013)).

1 After the close of the evidence at trial and during the closing arguments of the
2 parties, the court orally stated that its tentative ruling was to dismiss this case with a 180-
3 day bar to Debtor refiling another bankruptcy case.¹ The court now adopts this ruling. The
4 primary basis for this ruling was that Debtor's omission of income passed through to him
5 from his wholly-owned Subchapter S corporation, EPCO Consulting, Inc. ("EPCO"), on his
6 petition documents, including his income statement on Schedule I and the Statement of
7 Financial Affairs, and his postpetition Monthly Operating Reports, all of these documents
8 signed under penalty of perjury by Debtor, indicates a blatant attempt by Debtor to conceal
9 material income from his creditors, most notably Klein, and that this bankruptcy case was
10 filed in bad faith by Debtor in a further attempt to evade payment of creditors. See 26
11 U.S.C. §§ 1361 *et seq.* (Subchapter S of the Internal Revenue Code). As Debtor admitted
12 at trial, he was making \$5,000 per month in business income from EPCO, and EPCO was
13 and is paying his personal home loan payments which are his, and not EPCO's,
14 obligations, but such business income and home loan payments which are income to him
15 were not reported on his bankruptcy documents. As shown on Debtor's Monthly Operating
16 Report, No. 11, for the month of May 2019, filed on June 17, 2019, he reported that none
17 of the postpetition payments of his first priority home loan with Wells Fargo Bank of
18 \$2,325.21 per month and of his second priority home loan with California Bank of Trust of
19 \$1,797.94 per month were not made as Debtor was current on these payments because
20 EPCO was making these payments on his behalf. However, Debtor did not report any
21 income from EPCO on Schedule I or his Statement of Financial Affairs, Docket Number 24,
22 or on his Monthly Operating Reports, even though at trial he said that he had business
23 income of \$5,000 per month on average from EPCO. The court finds that Debtor was not
24 credible when he tried to explain in his testimony at trial that his repeated omission of
25 income from bankruptcy documents was simply an "oversight" or "mistake." Debtor in his
26 post-trial brief asserts that as he testified at trial, any omission of EPCO's profits/monetary

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28 ¹ Among the relief requested in the Motion to Dismiss was that the court impose a 180-day bar to Debtor
refiling another bankruptcy case pursuant to 11 U.S.C. § 105(a). See *Motion to Dismiss*, Docket Number 143
at 18-19.

1 withdrawals from EPCO's account was "inadvertent" because it was either a result of an
2 "oversight" on his part or his "sincere" belief that EPCO's financial affairs were distinct from
3 his own. *Debtor's Post-Trial Brief*, Docket Number 198 at 17, filed on June 21, 2019. The
4 court finds that Debtor's assertion and testimony on this point to be lacking in credibility
5 and unconvincing because Debtor knew that EPCO was making his home loan payments
6 every month and that he benefitted from this undisclosed income which he failed to report
7 on his bankruptcy schedules, statement of financial affairs and monthly operating reports.
8 Debtor further asserted that such omissions of income were "inadvertent" due to a
9 diminished ability to think and concentrate and a hearing difficulty based on his age and
10 medical condition. *Id.* The court finds this further assertion of Debtor not to be credible
11 and persuasive in the absence of any corroborating medical expert testimony in support of
12 such disability and that Debtor's assertion that he was only capable of receiving a steady
13 stream of income from EPCO in paying his home loan and other payments while incapable
14 of disclosing such income stream on his bankruptcy documents is not convincing. Based
15 on the court's observations of Debtor's demeanor at trial, the court determines that Debtor
16 was capable of making an honest disclosure of his income on his bankruptcy documents,
17 but he simply chose not to.

18 The multiple failures to disclose monthly income from his EPCO business of \$5,000
19 by Debtor on his bankruptcy documents are not *de minimis*. See *Cusano v. Klein*, 264
20 F.3d 936, 946 (9th Cir. 2001) (stating that a "debtor has a duty to prepare schedules
21 carefully, completely, and accurately") (citation omitted); Federal Rules of Bankruptcy
22 Procedure 1007 and 2015(a)(3). Debtor's assertion at trial that he would learn from his
23 "mistakes" and correct his omission in future filings after his omissions of income were
24 exposed at trial simply does not change the court's determination that his prior omissions
25 of income were not accidental, but deliberate, in attempting to conceal assets from his
26 creditors and limit the ultimate funding of a plan of reorganization. The totality of
27 circumstances regarding the filing of this case indicates a bad faith filing rather than a bona
28 fide attempt at reorganization, which includes the omission of income on petition

1 documents and postpetition Monthly Operating Reports, Debtor's failure to propose a plan
2 of reorganization and file a disclosure statement until only recently, which were filed on
3 June 27, 2019, almost one year after the filing of the petition on July 30, 2018, and after
4 the court stated its oral tentative ruling on June 13, 2019 that the case should be
5 dismissed, and that the case was filed only after Debtor failed to post a supersedeas bond
6 for his appeal of an adverse state court judgment in favor of Klein. Debtor's testimony at
7 trial regarding his purported attempts to obtain a bond in good faith is not credible. The
8 case law indicates that whether a debtor has filed a Chapter 11 petition to avoid obtaining
9 an appeal bond is a factor in determining whether a bankruptcy case is filed in bad faith. *In*
10 *re Mense*, 509 B.R. 269, 280 (Bankr. C.D. Cal. 2014). Also, Debtor's failures to disclose
11 his business income from EPCO on his postpetition Monthly Operating Reports also
12 constitute cause under 11 U.S.C. § 1112(b)(4)(H) for failure to timely provide information
13 reasonably requested by the United States Trustee since such reports are submitted to the
14 United States Trustee and these reports were materially inaccurate. 11 U.S.C.
15 §§ 704(a)(8) and 1106(a); Federal Rule of Bankruptcy Procedure 2015(a)(3). These
16 circumstances show that Debtor has not met his burden of proving that his Chapter 11
17 bankruptcy petition was filed in good faith.

18 In determining that cause exists to dismiss the case under 11 U.S.C. § 1112(b), the
19 court has also considered the best interests of creditors and the estate in determining that
20 dismissal is more appropriate than conversion or appointment of a Chapter 11 trustee.
21 Debtor failed to produce at trial any credible evidence of his ability to fund a plan of
22 reorganization in a good faith effort to pay his creditors. Moreover, this case appears to be
23 a two-party dispute between Debtor and Klein such that the appropriate remedy is that the
24 parties be allowed to proceed with their state court litigation and Klein be allowed to pursue
25 collection on his judgment outside of bankruptcy.

26 Accordingly, the court will enter a separate final order consistent with this
27 memorandum decision granting Klein's Motion to Dismiss pursuant to 11 U.S.C. § 1112(b)

1 and imposing a 180-day bar to Debtor refiling another bankruptcy case pursuant to 11
2 U.S.C. § 105(a) in light of the undue delay to creditors from this bad faith filing.

3 IT IS SO ORDERED.

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23 Date: July 30, 2019



24 Robert Kwan
25 United States Bankruptcy Judge
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